IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 1681 of 1999

in

SPECIAL CIVIL APPLICATIONNo 9527 of 1999

For Approval and Signature:

Hon'ble ACTG.CHIEF JUSTICE MR. C.K.THAKKAR
AND
Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

D M GOHIL

Versus

STATE OF GUJARAT

Appearance:
MR PARESH UPADHYAY for Appellant

CORAM : ACTG.CHIEF JUSTICE MR. C.K.THAKKAR and
MR.JUSTICE D.P.BUCH

Date of decision: 13/12/1999

ORAL JUDGEMENT (Per. C K Thakker, Actg.C.J.)

This appeal is filed against the summary

dismissal of Special Civil Application No.9527 of 1999.

2. Appellant was the original petitioner. He was prosecuted for offences punishable under the Prevention of Corruption Act, 1947. He was, however, acquitted by a Special Court. Being aggrieved and dissatisfied by the acquittal recorded by the trial court, the State has filed Criminal Appeal No.758 of 1994. The said appeal is already admitted by this Court and is pending for final hearing.

3. It appears that after the appellant was acquitted, an order of reinstatement was passed in his favour on September 6, 1995 - (Annexure 'C' to the petition). The appellant, in view of the acquittal recorded by the Special Judge was ordered to be reinstated on certain terms and conditions. One of the conditions provided that since a decision was taken to challenge the order of acquittal recorded by the trial court by filing an appeal in the High Court of Gujarat, the appellant would be bound by the decision which would be rendered by the High Court of Gujarat and in the meanwhile he will not claim regularisation of the period of suspension. The appellant was actually reinstated on 30.9.1995 but he did not give undertaking which was to be given as per the terms and conditions of the order of reinstatement Annexure 'C'. Hence, a communication came to be issued on 12.9.1996 Annexure 'D'. The appellant, by a letter on September 18, 1996 informed the department that he would not insist for regularisation of his services till the appeal filed against him will be finally disposed of (Annexure 'E' to the petition).

4. Thereafter, the appellant had made prayer for regularisation of his services in accordance with the provisions of Rule 152 of the Bombay Civil Services Rules, 1959 (hereinafter referred to as 'the Rules'). The said prayer was rejected by the authorities against which the petition was filed.

5. According to the authority, as an appeal against the order of acquittal is preferred, admitted and is pending before the High Court of Gujarat, no prayer for regularisation of services of the petitioner can be granted.

6. Learned Single Judge held that the acquittal had not attained the stage of finality in view of the fact that the acquittal was very much before this Court in an appeal against the acquittal filed by the State of

Gujarat. Non-passing of order under Rule 152 of the Rules, hence, cannot be said to be illegal or contrary to law.

7. The above order is challenged by the appellant before us.

8. Two contentions were raised by Mr Paresh Upadhyaya, learned counsel for the appellant. He urged that once the trial was over and the appellant was acquitted, he ought to have been regularised and the period of suspension ought to have been treated "as on duty" by passing an order for payment of salary of intervening period. In this connection, our attention was invited to Rule 152 of the Rules which provides as to when a Government servant on reinstatement, will be treated "as on duty" for all purposes.

9. In the alternative, the counsel submitted that if this Court is of the view that no such direction could have been issued, at least a limited direction should be issued to the authorities to consider the case of the appellant and to decide the question in accordance with law.

10. In our opinion, none of the contentions can be upheld. So far as the first prayer is concerned, the relevant provision is Rule 152 of the Rules. The said Rule is material in deciding the controversy raised in this appeal and requires to be quoted in extenso.

"152. (1) When a Government servant who has been dismissed, removed or suspended is reinstated, the authority competent to or the reinstatement shall consider and make a specific order -

(a) regarding the pay and allowances to be paid to the Government servant for the period of his absence from duty; and

(b) whether or not the said period shall be treated as a period spent on duty.

(2) Where the authority mentioned in sub-rule (1) is of opinion that the Government servant has been fully exonerated or in the case of suspension that it was wholly unjustified the Government servant shall be given the full pay and allowances to which he would have been entitled had he not been dismissed, removed or

suspended, as the case may be.

(3) In other case, the Government servant shall be given such proportion of such pay and allowances as such competent authority may prescribe;

Provided that the payment of allowances under clause (2) or (3) shall be subject to all other conditions under which such allowances are admissible.

(4) In a case falling under clause (2) the period of absence from duty shall be treated as a period spent on duty for all purposes.

(5) In case falling under clause (3) the period of absence from duty shall not be treated as a period spent on duty unless such competent authority specifically directs that it shall be so treated for any specified purpose."

In our opinion, the only interpretation which can be given to the above rule is that the proceedings must have been finalised and the authority must have formed an opinion that the suspension of the government servant was "wholly unjustified". It is true that in the case on hand, the appellant was acquitted by the Special Judge, Bhavnagar. But it is equally true that an appeal against order of acquittal is filed by the State of Gujarat which is already admitted and awaits final hearing. The question whether or not the appellant was properly acquitted by the Special Judge, Bhavnagar, is at large before this Court. In our considered opinion, therefore, the acquittal recorded against the appellant cannot be said to be final and Rule 152 of the Rules cannot be pressed in service at this stage.

11. The alternative argument of the learned counsel also cannot be accepted. Since the proceedings are not over and the appeal is still pending, no direction can be issued to the authorities to decide the case of the appellant in accordance with Rule 152 of the Rules. This is a premature stage. Such question can be decided only after the proceedings are over inasmuch as on the basis of the final order passed by a competent Court in criminal proceedings and/or departmental proceedings, the authorities will have to exercise jurisdiction under Rule 152 in accordance with statutory provisions. Hence, even that direction cannot be issued.

12. There is an additional reason also for not granting an equitable and discretionary relief to the petitioner-appellant though the learned Single Judge has not dismissed the petition on that ground. From the record, it is clear that the State had decided to file appeal against an order of acquittal and the appellant-petitioner was informed about that fact. Since the appellant was acquitted by a criminal court, he was ordered to be reinstated but with a clear understanding and on condition that a decision was taken to file appeal against an order of acquittal but the department will reinstate him in service provided he will not insist for regularisation of intervening period during which he was placed under suspension. The said order was accepted by the appellant-petitioner and he was reinstated. He was asked to given an understanding to that effect. The appellant, however, did not furnish necessary undertaking which was required to be furnished by him. He was, therefore, by another communication, asked to furnish necessary undertaking. Thereafter, such undertaking was given by him which is on record. Now the appellant backs out of that undertaking and claims regularisation.

13. It was no doubt, submitted that there cannot be an estoppel against statute. In our view, however, the contention is ill-founded, inasmuch as the course adopted by the authorities in asking for an undertaking cannot be said to be contrary to law or against the provisions of any statute since appeal against the order of acquittal is very much before the Court and the proceedings are not finally concluded. For that reason also, in our opinion, extra ordinary and discretionary powers under Article 226 cannot be exercised in favour of the appellant.

14. It may also to be appreciated that an anomalous situation may arise if the prayer of the appellant is granted by the Court at this stage. Suppose, tomorrow the appeal against acquittal is set aside and the appellant is convicted, what will happen to an order of regularisation passed in favour of the appellant ? As on today, a competent court or an authority will have to pass an order treating the appellant as acquitted because that is the only order which holds the field. In all probability, therefore, the authority will regularize the services of the appellant by treating the period of suspension "as on duty". If the appeal against the acquittal is allowed and he is convicted, not only that there is no question of regularisation of services of the petitioner-appellant, but he will be dismissed from service. In that case, the order which had been passed by this Court or by the authorities in pursuance of

direction of this Court would be contrary to law. Obviously, such mandamus cannot be issued by this Court.

15. For the foregoing reasons, we see no substance in this appeal. There is no infirmity in the order passed by learned Single Judge and LPA deserves to be dismissed. The LPA is accordingly dismissed with no order as to costs.

msp. ...